Supreme Court, U.S.
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No. 02-722

In The
Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,

Petitioners,

v.

JOHN GARAMENDI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, OHIO, TEXAS, AND WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Holocaust Victim Insurance Relief Act (HVIRA) – a California statute that requires insurance companies doing business in the State to report policy information regarding policies that it or its affiliates issued during the Holocaust-era – violates the Constitution's foreign affairs provisions where Congress has encouraged States to obtain Holocaust-era insurance information from foreign and domestic insurance companies, where the statute is not preempted by any treaty, statute, or executive agreement, and where the statute is evenhanded and does not insult or attempt to influence any foreign government.

2. Whether the HVIRA is within the historic police power of States, and therefore meets the legislative jurisdiction requirements of the Due Process Clause, because the statute (a) is directed to insurance companies doing business in California; (b) requires those companies to provide critical policy information needed for California residents to perfect their insurance claims; and (c) helps ensure that companies and their affiliates selling insurance to California's residents meet the State's high ethical standards.

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INTEREST OF THE AMICI STATES

Petitioners seek expansive interpretations of the Constitution's foreign affairs provisions and of the Due Process Clause that would have serious, far-reaching consequences for the amici States. Petitioners' attempt to prevent States from gathering information regarding business practices simply because the data concerns foreign activities, or activities of "affiliates" of an individual or business, would erode essential attributes of State sovereignty. States could be unduly constricted in their ability to learn about and use out-of-state conduct to evaluate professional licence applications, determine whether companies are fit to do business in the State, set criminal sentences, issue gun permits, and otherwise exercise their historic police power.

1. Under petitioners' broad interpretations, for example, States could be limited in their right to obtain information from state charities as to whether funds are being diverted to foreign terrorist organizations or to other improper purposes overseas.[1] States could likewise be hampered in ensuring that gambling operators licensed to do business in the State have no connections to foreign

[1] See Cal. Gov't. Code § 12598 (West 2003), and Corp. Code § 5250 (West 2003), giving the California Attorney General supervisory authority over charitable trusts. A sampling of the many other States with similar oversight provisions includes Georgia (Ga. Code Ann. § 53-12-116 (2002)), Idaho (Idaho Code § 67-1401 (2002)), Illinois (760 Ill. Comp. Stat. 55/7 (2003)), Massachusetts (Mass. Ann. Laws ch. 12, § 8F (2002)), Michigan (Mich. Stat. Ann. § 14.254 (2002)), New York (N.Y. Est. Powers & Trusts § 8-1.4 (2002)), Ohio (Ohio Rev. Code Ann. § 109.24 (Anderson 2002)) and Oregon (Or. Rev. Stat. § 128.670 (2001)).

criminal syndicates.[2] Criminal justice departments could be constrained in their ability to obtain information from contractors and others prior to issuing sensitive security clearances. States that ban their civilian residents from possessing machine guns, grenades, explosive missiles, and other military weapons could be restricted from requesting information from manufacturers regarding foreign sales that may be the source of illegal weapons smuggled into a State.[3]

2. Further, the amici States have an interest in seeing that insurance companies doing business in their States disclose policy information that will enable Holocaust survivors and their heirs to seek insurance benefits they are entitled to receive under their insurance policies. There are, for example. an estimated 20,000 Holocaust survivors currently living in California.[4] The survivors are

[2] See Cal. Bus. & Prof. Code §§ 19826(b) and (c) (West 2003) (State entity's responsibilities for monitoring and investigating gambling licensees). Examples of other States with similar statutes are Iowa (Iowa Code § 99F.4 (2002)), Montana (Mont. Code Ann. § 23-5-176 (2002)), Nevada (Nev. Rev. Stat. § 463.140 (2002)) and State of Washington (Wash. Rev. Code §§ 9.46.070, 9.46.075, 9.46.130, 9.46.140 and 9.46.153 (2002)).

[3] See Cal. Pen. Code §§ 12200, 12234, 12250, 12276, 12287, 12289.5, 12301, 12305 (West 2003) (weapons) and Cal. Gov't. Code §§ 11180-11191 (West 2003) (investigations). A few of the many other States that require the registration and production of information concerning military weapons include Colorado (Colo. Rev. Stat. §§ 9-7-103, 9-7-106, 9-7-109 (2002)), Maryland (Md. Code Ann., Criminal Law § 4-403 (2002)), New Jersey (N.J. Stat. §§ 2C:39-1 and 2C:58-1 (2002)) and New York (N.Y. Penal Law §§ 265.00 and 400.00 (consol. 2002)).

[4] See L.A. Times, May 11, 2001, at pt. 2, p. 5, *available at* LEXIS, News Library (estimate of 22,000 California survivors). Also see Sacramento Bee, April 26, 2000, at p. A1, *available at* LEXIS, News Library (20,000 estimate). (That estimate may be low due to recent

(Continued on following page)

elderly.[5] For them, the phrase "justice delayed is justice denied" is particularly apt. Each significant delay in the disclosure of critical policy information reduces the number of Holocaust survivors that will be alive to obtain justice.

Moreover, petitioners' implication that survivors will obtain relief from the limited number of insurance companies that have participated in the International Commission on Holocaust Era Insurance Claims (ICHEIC) is unsupported. A recent congressional report concluded that the ICHEIC effort to resolve Holocaust-era insurance claims is not succeeding. One of the main reasons cited was the insurance companies' strategy of delay in producing policyholder names:

> There are five insurance companies that signed the Memorandum of Understanding (MOU) that established ICHEIC. In general, however, their participation has been marked by delay and

immigration from the former Soviet Union. See *Id.*) When California's Holocaust Victim Insurance Relief Act (HVIRA) was enacted, there were 5,600 actually documented Holocaust survivors living in California. Cal. Ins. Code § 13801(d) (West 2003).

Although national estimates vary, the American Red Cross cites a figure of 280,000 survivors and family members living in the United States. See http://www.redcross.org/services/intl/holotrace/questions.html (visited March 4, 2003).

[5] See, for example, *US, European Insurance Regulators Gather in London on Holocaust Claims,* Agence France Presse, June 10, 1998, *available at* LEXIS, News Library (reporting on a meeting of United States and European insurance regulators in London): "US regulators were anxious to settle the claims as quickly as possible because the average age of US [Holocaust insurance] claimants is 82." See also ER 1700 (average age of Holocaust survivor, in Los Angeles County, is over 70 years of age).

obstruction. These companies have failed to provide comprehensive lists of policyholder names.[6]

3. Finally, the amici States have an interest in ensuring that, by resisting disclosure, petitioners do not obtain an unfair financial advantage over the many companies that have reported essential policy information.[7] Companies that disclose this information – and then pay legitimate claims – incur economic liabilities that resisting companies avoid.

For all of these reasons, the amici States strongly oppose petitioners' expansive interpretations of the Constitution and their attempts to withhold critical policy

[6] See *The Status of Insurance Restitution for Holocaust Victims and Their Heirs*, Minority Staff, Committee on Government Reform, U.S. House of Representatives (Nov. 13, 2001), http://www.house.gov/reform/min/maj/maj_holocaust.htm (then go to "Hearings on Holocaust Insurance Restitution, November 8, 2001"). *Also available at* LEXIS, U.S. Congress Library.

[7] Companies that have disclosed Holocaust-era information to the California Department of Insurance include Mutual of New York, as well as the California affiliates of Dutch insurers that are members of the Dutch Insurance Association (Soja). Mutual of New York, for example, complied with the HVIRA by providing the requisite information regarding approximately 33,000 policies. The policy information provided by these companies is available on the California Department of Insurance website. See http://www.insurance.ca.gov/docs/FS-Holocaust.htm (go to "Policyholder Lists"; visited March 3, 2003). In addition, the American affiliates of Aegon N.V., British Prudential Insurance Group, Fortis (NL), ING Group and The MONY Group have provided extensive policy information to the Washington Department of Insurance. See www.insurance.wa.gov (go to "Information for Consumers," then "Holocaust and Insurance," then "Click here for a list of names of the American affiliates * * *."; visited March 3, 2003).

information that Holocaust survivors need to submit their insurance claims.

SUMMARY OF ARGUMENT

1. Petitioners assert that the HVIRA's reporting requirements allegedly violate foreign affairs provisions that are both generally implied in the United States Constitution, and specifically contained in the Commerce Clause. Congress, however, has *encouraged* States to obtain Holocaust-era insurance information from foreign and domestic insurance companies. Under this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994), that congressional support defeats petitioners' foreign affairs challenge.

2. Even absent such congressional encouragement, the HVIRA would not violate the Constitution's foreign affairs provisions. The Act constitutes a legitimate effort by the State of California to provide for the welfare of its residents. It seeks information from corporations doing business in California that is needed for California residents to perfect their Holocaust-related claims. Moreover, it is evenhanded – it does not try to judge, or alter, the policies of foreign governments, but instead seeks information from all insurance companies doing business in California, and related companies, that issued policies in Europe between 1920 and 1945.

3. Finally, the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause. The States' historic police power is especially broad in the area of insurance company regulation. It fully includes the right of a State to require insurance companies doing

business in the State to disclose insurance policy information that, among other things, reflects upon the ethical integrity of the company and its affiliates.

ARGUMENT

I. CONGRESS HAS ENCOURAGED STATE INVOLVEMENT IN RESOLVING HOLOCAUST-ERA INSURANCE CLAIMS, THEREBY UNDERCUTTING ANY FOREIGN AFFAIRS AND COMMERCE CLAUSE CHALLENGE TO THE HVIRA.

Petitioners assert that the policy reporting requirements of the HVIRA violate foreign affairs provisions in the United States Constitution. In support of this claim, petitioners principally rely upon *Zschernig v. Miller*, 389 U.S. 429 (1968), the only decision by this Court striking down a state statute based upon the general foreign affairs powers that it found to be implied in the Constitution. This brief will show, however, that the controlling case in the instant lawsuit is not *Zschernig*, but rather the Court's significantly more recent decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal., supra*, 512 U.S. 298, which held that congressional acquiescence regarding a state policy negates any constitutional foreign affairs infirmity. This brief will then show that Congress not only acquiesced, but actively supported – through both legislation and congressional statements – efforts by California and other States to obtain Holocaust-era benefit information from insurance companies.

A. *Barclays*, Not *Zschernig*, Provides the Most Appropriate Test for Reviewing Petitioners' Foreign Affairs Challenge of the HVIRA.

1. In *Barclays*, the petitioners challenged the constitutionality of California's multinational corporate tax. They not only presented a specific dormant Commerce Clause claim, but they – like the petitioners in this case – also brought a general foreign affairs challenge. Relying heavily on *Zschernig*, they asserted that "[w]here state legislation or action interferes with the conduct of foreign affairs by the Federal Government, the Constitution itself preempts it." See Petitioner's Brief for Barclays Bank PLC, LEXIS 1992 U.S. Briefs 1384 (Argument II) (December 15, 1993). Although this Court did not expressly cite *Zschernig* or a foreign affairs doctrine per se, it rejected petitioners' charges that California's multinational corporate tax violated the Commerce Clause by frustrating the ability of the federal government to "speak with one voice when regulating commercial relations with foreign governments." *Barclays*, at 302-303 (citation and internal quotation marks omitted).

Petitioners in *Barclays* had argued that California's statute must be deemed an unconstitutional state intrusion into foreign affairs, because the statute was opposed by a host of major foreign governments (the British Parliament went so far as to enact retaliatory legislation [*Barclays* at 324, n.22]), and because the statute was opposed by the Executive Branch as an impermissible state intrusion into foreign affairs. *Id.* at 328. This Court, however, rejected these arguments. It explained that, at least as to matters that affect commerce, under the Constitution it was the job of *Congress*, not the Executive

Branch, to determine whether a State has improperly intruded into foreign affairs. *Id.* at 329.

Moreover, *Barclays* explained that Congress need not make that determination affirmatively, but can make it "implicitly" through "acquiescence." *Barclays* at 326 and 330. See also A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J. Int'l L. 1, 25 (1995) ("*Barclays Bank* proceeds on the principle that congressional acquiescence in a State practice affecting the commercial aspect of foreign relations is sufficient to validate that practice even if its negative effect on American dealings with other countries is demonstrable.").

2. *Zschernig* is the only decision of this Court to invalidate a State law based upon a general foreign affairs doctrine.[8] *Zschernig* involved an Oregon inheritance statute, under which property escheated to the State when a nonresident alien claimed the property unless, inter alia, there was a reciprocal right of United States citizens to take property on the same terms as a citizen of the foreign country. *Id.* at 430-431. Previously, this Court had upheld a similar California statute against a similar attack. See *Clark v. Allen*, 331 U.S. 503 (1947). This Court in *Zschernig* explicitly declined to overrule *Clark*. *Zschernig* at 432. Instead, it held that while the statute reviewed in *Clark* was valid on its face, the Oregon statute was invalid because of the way it was being applied.

[8] "The only case in which the Supreme Court has struck down a State statute as violative of the foreign affairs power is *Zschernig*." *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998), *rev'd in part on other grounds sub nom. United States v. Locke*, 529 U.S. 89 (2000).

Specifically, the *Zschernig* Court found that the Oregon statute was being used as a weapon in the Cold War. Courts were searching "for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory." *Id.* at 667-668. Reviewing State court opinions applying the Oregon statute, this Court found that "[a]s one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata." *Id.* at 668-669. Although previously, this Court had only struck down State statutes based upon federal *preemption*,[9] for instance, where they conflicted with the Commerce Clause (see *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875)), a federal statute (see *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941)), or an international compact (see *United States v. Pink*, 315 U.S. 203, 229 (1942)), *Zschernig* held that even absent such preemptive provisions, a State statute could contravene foreign affairs provisions that it read into the Constitution.

This Court's post-*Zschernig* decisions have avoided that opinion's nebulous foreign affairs doctrine. Most significantly, in *Barclays* this Court solely relied upon Commerce Clause jurisprudence in upholding the constitutionality of California's multinational tax. If a more restrictive foreign affairs doctrine had applied, however, then *Barclays* would have presumably needed to determine whether, even if California's statute was consistent with the Commerce Clause, it violated *Zschernig's* foreign affairs doctrine. (As previously noted, the petitioners in *Barclays* specifically alleged that California's tax violated

[9] See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1649-1650 (1997).

the *Zschernig* doctrine.) The fact that *Barclays* did not proceed to that review implies that it rejected the applicability of a stricter foreign affairs doctrine.[10]

3. *Barclays'* reliance on the Commerce Clause, rather than on an amorphous foreign affairs doctrine, is consistent with the approach followed by the Court elsewhere. Most notably, in the due process context, "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The same justification for restraint in the due process context applies here, i.e., "the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation and internal quotation marks omitted).

Of all of the constitutional provisions that relate to foreign affairs, the Commerce Clause is the only one that is arguably applicable to the HVIRA. The other foreign affairs provisions concern areas such as naturalization, treaties, the imposition of duties, and the declaration and conduct of war. The HVIRA does not even tangentially implicate any of those provisions. The statute does,

[10] See also *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000), which overturned Massachusetts' Burma law on the ground that it was preempted by the federal Burma law. In that case, because the Court invalidated the State statute based upon preemption, it found no need to reach petitioners' *Zschernig* challenge.

however, regulate commerce, namely the conduct of insurance companies doing business in California.

4. *Barclays'* reliance on the Commerce Clause, as opposed to the foreign affairs doctrine created by *Zschernig*, is also consistent with the requirements of the Tenth Amendment to the Constitution, under which powers that are not prohibited, or granted to the United States, are reserved to the States.[11] This Court has explained that "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." *Alden v. Maine*, 527 U.S. 706, 739 (1999), quoting *Nevada v. Hall*, 440 U.S. 410, 425 (1979).[12]

In the instant case, given that the Commerce Clause is the only foreign affairs constitutional provision that relates to a matter covered by the HVIRA (commerce), combined with the Tenth Amendment's reservation of powers to the States, the logical approach is to review this case under this Court's Commerce Clause jurisprudence. *Barclays'* test should therefore be used in analyzing petitioners' foreign affairs challenge of the HVIRA.

[11] That amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people."

[12] See also Goldsmith, *supra*, 83 Va. L. Rev. 1617, 1642 ("The most natural inference from these provisions and from the Constitution's enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty.").

B. Applying *Barclays*, Petitioners' Foreign Affairs Challenge Fails Because Congress Has Encouraged States to Seek Holocaust-era Insurance Information.

While *Barclays* indicated that congressional acquiescence can be sufficient to validate a State's actions that implicate foreign affairs (see *infra* pp. 6-7), in the instant case, Congress has gone further than mere inaction. Congress has *encouraged* the type of State involvement in resolving Holocaust-era insurance claims that is reflected in California's HVIRA.

1. On June 23, 1998, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note). The Act established the Presidential Advisory Commission on Holocaust Assets in the United States. On December 9, 1999 (two months after California's HVIRA was enacted), Congress amended the statute to extend the term of the Presidential Commission. See P.L. 106-155, 113 Stat. 1740. The Act directs the Commission to obtain information regarding, inter alia, insurance policies and proceeds thereof. U.S. Holocaust Assets Commission Act of 1998, § 3(a)(2)(E). In directing the Commission to obtain Holocaust-era insurance information, Congress *assumed* that the States were actively involved in this area.[13] Rather than expressing an

[13] State activities seeking to resolve Holocaust-era insurance claims included reporting statutes. See, for example, New York's Holocaust Victims Insurance Act of 1998 (N.Y. Ins. Law §§ 2701 and 2705 (consol. 1998)), which required insurance companies to report specified information regarding Holocaust-related policies issued between 1920 and 1945. Similar provisions were subsequently adopted

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intent to occupy the field, Congress encouraged the States to continue such work. Specifically, Congress mandated that the Commission:

> *shall encourage* the National Association of [State[14]] Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic *and foreign*, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims. . . .

U.S. Holocaust Assets Commission Act of 1998, § 3(a)(2)(E) (emphasis added).

2. Moreover, when Congress first enacted the Act in June 1998, it was aware that States were trying to get insurance companies to disclose the type of information covered by California's HVIRA. On February 12, 1998, extensive testimony regarding State activities in this area was presented to the House Committee on Banking and Financial Services. At that hearing, Washington State's Insurance Commissioner explained that: "We have asked the insurers to release complete lists of policyholders, as have the Swiss banks released names of accounts, so that they may be cross-referenced with Holocaust registries

by Florida (Fla. Stat. ch. 626.9543 (1999)), Maryland (Md. Code Ann., Ins. § 28-105 (1999)) and Minnesota (Minn. Stat. § 60A.053 (2000)).

[14] The National Association of Insurance Commissioners "is the organization of insurance regulators from the 50 states." See http://www.naic.org/1misc/aboutnaic/about/about01.htm (visited Feb. 25, 2003).

contained at Yad Vashem or at the Holocaust Museum here in this country." See *The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Banking and Fin. Services*, 105th Cong. 131 (1998) (hereinafter "*Insurance Hearing*"). And Congress knew, even before California's HVIRA was enacted, that States might compel insurance companies to provide Holocaust-related policy information. Insurance commissioners from the States of Washington and California, for example, testified that companies might be required to provide needed information upon the threat of losing their right to sell insurance in their States. *Id.* at 132 (Washington) and 142 (California).

The congressional committee did not react by indicating that the States were improperly meddling in international affairs. To the contrary, the States were applauded for their efforts. Then-Committee Chairman Jim Leach thus responded to the Insurance Commissioners' testimony as follows:

> Thank you, just in concluding, let me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one relates to the Federal nature of America, particularly in the insurance arena, the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation, which gives the States a significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices. And it's important that it be understood that this authority is very large, and is large

> because it is assumed it is being appropriately carried out. So I want to simply thank you for your leadership on this issue and not that it is not simply an advocate in nature, that is, there is an enormous authority that rests in a devolved way, in the American Federal system, with the States, and in particular in this area, with the State insurance commissioners. Thank you very much.

Id. at 157.[15]

Thus, as in *Barclays*, Congress was aware of the state activities in question, in this case the efforts of California and other States to obtain information from insurance companies regarding policies issued in Europe during the Holocaust. Congress has not acted to stop those State efforts. Just the opposite. Congress – through the U.S. Holocaust Assets Commission Act of 1998, and congressional statements – has encouraged the States to continue their efforts. As then-Chairman Leach explained, "[t]he committee will be monitoring the progress of private and state efforts, and if required, we're ready to lend a hand."

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[15] This congressional support of State efforts to obtain insurance information continued after the enactment of the U.S. Holocaust Assets Commission Act of 1998. See, for example, the statement of Congressman Brad Sherman commending the efforts of the States of California and Washington (made during the *Restitution of Holocaust Assets: Hearing Before the House Comm. on Banking and Fin. Services*, 106th Cong. 63 (2000)); and Congressman Henry A. Waxman's statement that "[b]ecause of the California law, policy information is getting out of companies' archives and into the hands of the rightful beneficiaries." *Hearing on H.R. 2693 before the Subcomm. on Gov't Efficiency, Financial Management and Intergovernmental Relations*, 107th Cong. (2002) available at http://www/.house.gov/reform/min/maj/maj_holocaust_hearing_sept_24.htm.

Insurance Hearing at 186. Under *Barclays*, the HVIRA therefore withstands any assertion that it is invalid under the foreign affairs provisions in the Constitution.

C. Petitioners Improperly Place Great Weight on Executive Branch Statements.

1. In pressing their foreign affairs claim, petitioners rely heavily on statements by Executive Branch officials. This Court, however, has cautioned that such "Executive Branch actions – press releases, letters and amicus briefs – * * * are merely precatory." *Barclays*, *supra*, 512 U.S. at 329-330. They do not have any substantive weight, absent "the President's power to preempt state law pursuant to authority delegated by a statute or a ratified treaty"; or possibly authority based upon "legally binding executive agreements." *Id.* at 329. *Cf. Crosby v. National Foreign Trade Council*, *supra*, 530 U.S. 363, 380 (Such statements are properly considered where a federal statute directs the President to develop a "comprehensive, multilateral strategy" in a field.).

2. In addition to citing Executive Branch statements, petitioners argue that "executive agreements * * * conflict with the HVIRA" and that these "[e]xecutive agreements have the same force as treaties or statutes." Pet. Br. 28. There are two basic flaws with petitioners' argument. First, *Barclays* expressly left open the question of "whether the President may displace state law pursuant to legally binding executive agreements with foreign nations." *Barclays* at 330. Second, as the United States itself has acknowledged, that question is not even present in

this case. Although the Executive Branch entered into an agreement with Germany in 2000 (Pet. App. 153a-168a),[16] by it terms it does not displace the HVIRA's reporting requirements. Thus, in its Ninth Circuit Court of Appeals brief, the United States emphatically denied that the German agreement preempts the HVIRA. Resp. App. 49. Rather, it candidly admitted that the agreement "specifically declares that '[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal' of private claims." Resp. App. 48 (emphasis added); see also Pet. App. 167a. The United States therefore explained that petitioners were "mistaken [to the extent that they] suggest that the Agreement by its terms preempts the California statute." Resp. App. 48-49.

Moreover, the German agreement only applies to lawsuits seeking damages or similar relief, not to reporting statutes. By its terms, the agreement is limited to "cases * * * in which * * * a claim has been asserted against German companies." Pet. App. 165a; see also Pet. App. 155a. No claim for damages or other relief has been asserted against any company in the instant lawsuit; rather, companies doing business in California instituted these lawsuits to challenge California's reporting requirements. This Court does not, therefore, need to consider the *Barclays'* question of whether a legally binding executive agreement can displace state law, because the instant agreement does not attempt to displace the HVIRA.

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[16] The Executive Branch also entered an almost identical agreement with Austria. See Pet. Br. 8.

3. Congress, "whose voice, in this area, is the Nation's," *Barclays* at 331, being fully informed of state activities seeking to obtain insurance policy information, has been supportive of the efforts of California and other States. The HVIRA is fully consistent with the congressional intent that the States be encouraged "to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States * * *." U.S. Holocaust Assets Commission Act of 1998, *supra*, § 3(a)(2)(E). Thus, notwithstanding negative Executive Branch statements, the HVIRA is constitutional.

II. EVEN IF CONGRESS HAD NOT ENCOURAGED STATE EFFORTS, AND EVEN IF *ZSCHERNIG* APPLIED, THE HVIRA WOULD BE VALID.

Absent congressional support, and even if *Zschernig* rather than *Barclays* applied to challenges of state commercial statutes, the HVIRA would not violate any foreign affairs provisions of the Constitution. It is an evenhanded law that seeks to help state residents and to ensure that insurance companies doing business in California meet high ethical standards.

1. The validity of the HVIRA under *Zschernig* is demonstrated by the reasoning underlying the Third Circuit Court of Appeals' decision in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991). In upholding a State "buy American" statute, *Trojan* explained that under *Zschernig*, statutes that are not intended to punish undesirable

governments, and are applied evenhandedly, do not run afoul of the Constitution's foreign affairs provisions.

The HVIRA is directed to *corporations*, not governments. It does not turn upon the policies or structures of foreign governments. Moreover, its application is not only evenhanded, but is also ministerial. The HVIRA therefore sharply contrasts with the statute in *Zschernig*, which was being applied in accordance with officials' and judges' Cold War attitudes about particular foreign nations. *Id.* at 668-669.

2. The HVIRA also stands in sharp contrast to statutes such as Massachusetts' Burma law. This Court recently invalidated that state law on the ground that it is preempted by a similar federal statute. See *Crosby v. National Foreign Trade Council*, *supra*, 530 U.S. 363, 374. Massachusetts' Burma law generally prohibited that State's agencies from purchasing goods or services from companies that did business with Burma (now Myanmar). An important purpose was to pressure Burma's regime to reform its government. The HVIRA, in contrast, is not seeking to rid Europe of Nazi oppression (which was accomplished years ago during World War Two) or to alter unfriendly governments. Rather, the Act seeks to require *California corporations* to disclose insurance policy information so that claims can be perfected by *California* residents who are Holocaust survivors, and by *California* residents who are heirs or beneficiaries of Holocaust victims, and so that the ethical character of insurance companies doing business in California can be disclosed to state regulators and to California's citizens. Thus, even if *Zschernig* applied, and even absent congressional support, petitioners' foreign affairs challenge of the HVIRA would fail.

III. CALIFORNIA HAS LEGISLATIVE JURISDICTION UNDER THE DUE PROCESS CLAUSE TO REQUIRE CALIFORNIA INSURANCE COMPANIES TO DISCLOSE POLICY INFORMATION THAT AFFECTS THE WELFARE OF CALIFORNIA RESIDENTS.

Petitioners' other assertion – that the HVIRA exceeds California's legislative jurisdiction under the Due Process Clause – is equally erroneous. The statute falls well within the historic police power of the States.

1. Most cases analyzing legislative jurisdiction concern a choice-of-law question. The issue in those cases, many of which are cited by petitioners, is whether a State has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 313 (1981).[17] Petitioners' legislative jurisdiction challenge to HVIRA, however, does not involve a choice-of-law question. Rather, it turns on the scope of the States' police power.

2. The Constitution gives the States broad authority to protect their citizens. This reservation of "a generalized police power to the States is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 619, fn. 8 (2002). That authority is particularly strong

[17] The HVIRA would unquestionably meet a significant contact test. It requires California insurance companies to disclose information that is needed (a) for California residents to obtain benefits under policies issued by the California companies or their affiliates and (b) for Californians to be informed about the ethical character of companies doing business in the State.

in our case, where "the business of insurance is involved – a business to which the government has long had a 'special relation.'" *California State Automobile Association v. Maloney*, 341 U.S. 105, 109-110 (1951) (footnote and citation omitted). Indeed, this Court has stressed that, in the area of insurance, the police power is so broad that a State can even "take over the whole business, leaving no part for private enterprise." *Id.* at 110.

In the instant case, petitioners assert that, because the information they are required to disclose under the HVIRA concerns out-of-state insurance policies, California lacks the power to require that production. This Court, however, has rejected similar challenges to governmental "extraterritorial" authority where considerably greater individual rights were involved. Most notably, in *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941), this Court upheld the right of a State to impose *criminal* penalties on a resident for using diving equipment to harvest sponges in international waters. *Skiriotes* explained that "[w]hen its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances." *Id.* at 79. See also *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (affirming criminal law jurisdiction concerning out-of-state act); *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932) (affirming extraterritorial federal subpoena jurisdiction).

3. Given this broad latitude, it is not surprising that this Court has repeatedly recognized the right of States to regulate insurance company practices even where they involve out-of-state activities. In *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649-650 (1950), for example, this

Court held that Virginia may enjoin a company, located *and operating* in Nebraska, from doing business with Virginia residents unless it submitted to Virginia jurisdiction. Quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 320-321 (1943), this Court reiterated that state cease and desist orders do not violate due process "'merely because they affect business activities which are carried on outside the state.'" *Travelers Health* at 650. Likewise, in *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940), this Court upheld the power of Virginia to require out-of-state insurance companies to sell their policies through resident agents, explaining that "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

More recently, in *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648 (1981), this Court upheld a California insurance tax that was designed to influence the policies of other States, against constitutional challenges that included a due process argument that the Court assumed was subsumed in an equal protection claim. *Id.* at 656. The Court explained that the "tax should be sustained if we find that its classification is rationally related to achievement of a legitimate state purpose." *Id.* at 657. The Court concluded that, while "many may doubt the wisdom of" the tax, applying this test it is constitutional. *Id.* at 670-671.

4. Viewed against those standards, the HVIRA is firmly within California's legislative jurisdiction. It is directed to insurance companies doing *business in California*. Moreover, its focus is on having those companies provide critical policy information needed for *California* residents – including the thousands of Holocaust survivors

living in California, as well as their heirs and beneficiaries – to perfect their insurance claims. It therefore furthers the State's "interest in protecting vulnerable groups – including the poor, the elderly, and disabled persons – from abuse, neglect, and mistakes." *Washington v. Glucksberg*, *supra*, 521 U.S. 702, 731 (rejecting Due Process challenge to state ban on physician-assisted suicide).

Finally, the HVIRA helps ensure that companies and their affiliates selling insurance to California's residents meet the State's high ethical standards. Although petitioners question whether this was one of the "true" motives of the California Legislature in enacting the HVIRA, the statute itself expressly states that it is the "responsibility" of these companies to disclose Holocaust-related policy information. Cal. Ins. Code § 13801(e) (West 2003). The Legislature determined that companies refusing to meet their responsibility, or choosing to remain affiliated with such entities, should be denied the privilege of doing business in California. *Id.* § 13806. The statute, on its face, therefore indicates a concern about the ethical character of companies doing business in the State.[18]

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[18] Even if that purpose had not been expressed by the Legislature, as long as the enforcement of ethical standards *could* have been a legislative purpose, the statute should be held constitutional. Under this Court's long-standing general deference to legislative decision making in due process and other contexts, legislation is upheld as long as there is "any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (substantive due process). See also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993), where this Court explained that:

> [T]hose attacking the rationality of the legislative classification [in an equal protection challenge] have the burden to

(Continued on following page)

In seeking to constrict the authority of California and other States to regulate insurance companies doing business within their borders, petitioners ignore the "[d]ual sovereignty" that "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, ___ [122 S. Ct. 1864, 1870] (2002). The requirement that insurance companies operating in a State report policy information to that State's insurance regulators and citizens that, among other things, reflects upon the ethical character of the company and its affiliates, is fully within the historic police power of the States. The HVIRA is constitutional.

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negative every conceivable basis which might support it. * * * Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. (Citation and internal quotation marks omitted.)

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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